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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. REGINALD VAUGHN CORNELIUS et al., Defendants and Appellants.	C082687 (Super. Ct. No. 15F05647)

The victim and defendants Reginald Vaughn Cornelius and James Anthony Wilder were at a friend's birthday party. When the victim went to leave, Wilder and Cornelius stopped him and pointed guns at him. The defendants each pistol-whipped the victim, and Wilder shot the victim in the hand. A jury convicted each defendant of assault with a firearm and pistol-whipping, and found true enhancement allegations that each had personally used a firearm and personally caused great bodily injury. The jury also convicted Wilder of assault by discharging a firearm and Cornelius of being a felon in possession of a firearm.

Defendant Wilder appeals contending the trial court erred in excluding opinion testimony from Deputy Taylor that the firearm discharge was accidental. Alternatively, Wilder contends trial counsel was ineffective in failing to object.

Defendant Cornelius appeals contending: (1) the trial court erred in failing to stay his conviction for being a felon in possession of a firearm under Penal Code section 654[1]; (2) the trial court improperly calculated his presentence custody credits;[2] (3) the trial court erred in imposing a $340.01 booking fee in the absence of evidence supporting this amount. In supplemental briefing, joined by defendant Wilder,[3] defendant Cornelius requests we remand for resentencing on the firearm enhancement under Senate Bill No. 620 (Senate Bill 620) (2017-2018 Reg. Sess.) (Stats. 2017, ch. 682).

We will remand for resentencing on the firearm enhancement and for correction of the booking fee in the abstract of judgment, in all other respects we affirm the judgment. We hold: (1) Wilder forfeited his claims against the admission of Deputy Taylor's opinion testimony, and counsel was not ineffective; (2) the trial court did not err in failing to stay Cornelius's conviction for being a felon in possession of a firearm as his possession was a distinct and separate act from the pistol-whipping of the victim; and (3) the trial court properly imposed a $367.81 jail booking fee. We will remand to allow the trial court to exercise its discretion under Senate Bill 620.

RELEVANT FACTUAL BACKGROUND

After visiting a woman he was dating, the victim was invited to her neighbors' apartment. Wilder and Cornelius arrived about 45 minutes later and they were introduced

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1 Undesignated statutory references are to the Penal Code.

2 We have received an amended abstract of judgment from the trial court indicating this error has been corrected. Accordingly, we do not address this claim.

3 Although Wilder did not separately file a brief on this issue, in their reply briefs, each defendant joined in all issues raised by their codefendant that might benefit them.

to the victim. Everyone was drinking alcohol. About an hour later, the victim and S. went to get some fast food and came back. The other neighbor, D., Wilder, and Cornelius stayed at the apartment. After a while, the victim thought things were getting boring, and decided to leave. He moved toward the door and Wilder and Cornelius stood up. Wilder pulled a gun out and pointed it at the victim. Cornelius lifted his shirt to show he also had a gun.

The victim thought they might want to rob him of the cash keys to the nearby gas station where he worked. He attempted to distract Wilder by saying the gun was not real. After Wilder showed him the bullets inside the gun, the victim tried to take the gun from him. He pushed Wilder to the couch and the gun fell out of Wilder's hand. Cornelius ran toward the victim with his gun in hand and pistol-whipped him. The victim grabbed Cornelius, and they struggled. Wilder then ran behind the victim and pistol-whipped him. The victim and Cornelius continued to struggle, when the victim saw Wilder pointing a gun at him. The victim pushed off of Cornelius and was immediately shot through his right wrist. Cornelius yelled he had also been shot and Cornelius and Wilder left. The victim told S. he needed to go to the hospital and S. took him.

S. testified that prior to the fracas, the victim had been playing around with Cornelius and Wilder and tried to grab the gun. As the evening progressed, the victim continued to confront Wilder, and was "pushing it." Eventually, when Wilder pulled out the gun, the victim tried to grab it. S. lied to the police in his first statement, because he did not want to be involved. He was also on a "come down" from using crystal meth. S. had also smoked marijuana that night. S. gave a subsequent statement to Deputy Taylor at the hospital. His second statement did not mention the victim provoking any altercation and was consistent with the victim's statements that defendants had initially confronted the victim with guns. D. drank a lot of whisky and blacked out, so did not witness the shooting. Both neighbors stated they believed the victim had gotten high that night. A blood test of the victim at the hospital at 5:30 a.m. was negative for

methamphetamine, opiates, cocaine, and marijuana. Based on the test results, Dr. Garzon opined the victim could not have used any of the drugs screened for within the 24 hours prior to the urine sample.

The victim spoke with Deputy Taylor at the hospital while receiving treatment in the emergency room, including morphine. The victim also acknowledged he had been drinking. The victim identified Cornelius and Wilder in photo lineups. Deputy Taylor also spoke to S. at the hospital. S. was initially evasive. Later, S. was more forthcoming. Taylor recorded the second interview with S. and that interview was played for the jury. These initial interviews were to determine whether a crime had been committed and whether there were outstanding suspects or additional victims. A different officer, a detective, generally does the follow up.

Deputy Flores was dispatched to the apartments and found Cornelius with a gunshot wound on his arm. Cornelius claimed he had been hit by a drive-by shooter. Wilder arrived and claimed he had been inside and had not seen anything.

Cornelius testified that when he originally arrived at the apartment, around 1:30 a.m., he did not have the gun. He left to help a friend move. The friend asked Cornelius to hold on to his gun, as the friend was moving in with his children and their mother and did not want to take the gun. He said he would take the gun back once he moved in to his own apartment. The friend dropped Cornelius off at D.'s apartment at about 3:30 in the morning. Cornelius kept the gun in the waistband of his pants, where it stayed until he lost it in the struggle with the victim. Cornelius knew he was not supposed to have the gun because of his 2014 felony conviction.

Cornelius also testified the victim tried to get the gun from him and he hit the victim with the magazine. They began to fight and when Wilder reentered the apartment, he heard a gun fire. Cornelius realized he had been shot and he and Wilder left the apartment.

Wilder testified that after some time at the apartment, he heard a loud noise and saw Cornelius and the victim fighting. The victim had Cornelius pinned to the ground. Wilder grabbed his gun, ran toward the victim, and hit him on the back of his head. The gun accidentally discharged and hit the victim as Wilder struck him.

PROCEDURAL HISTORY

An information charged both defendants with the attempted murder of the victim (§ 664/187, subd. (a)--count 1), and alleged each defendant had personally used a firearm (§ 12022.53, subd. (b)) and Wilder had personally and intentionally discharged a firearm that proximately caused great bodily injury to the victim (§ 12022.53, subds. (c), (d)). The information also charged Wilder with assault with a firearm by discharging it (§ 245, subd. (b)--count 2) and assault with a firearm by pistol-whipping the victim (§ 245, subd. (b)--count 3). As to both counts, the information also alleged Wilder used a semiautomatic firearm (§ 12022.5, subds. (a), (d)), and as to count 2 alleged Wilder personally inflicted great bodily injury upon the victim (§ 12022.7, subd. (a)). The information charged Cornelius with assault with a firearm (§ 245, subd. (b)--count 4), and alleged Cornelius used a semiautomatic firearm (§ 12022.5, subds. (a), (d)), and with being a felon in possession of a firearm (§ 29800, subd. (a)(1)--count 5). A jury acquitted both defendants on count 1, found Wilder guilty of counts 2 and 3 and found the enhancement allegations true, and found Cornelius guilty of counts 4 and 5 and found the enhancement allegations true.

The trial court sentenced Cornelius to serve an aggregate term of 10 years 8 months in state prison; consisting of 6 years for his assault with a firearm conviction and an additional 4 years for the personal use of a firearm enhancement; a consecutive 8 months (one-third the middle term) for being a felon in possession of a firearm conviction. The trial court ordered Cornelius to pay various fines and fees, including restitution to the victim. The trial court awarded Cornelius 359 days of

presentence custody credits, 313 days of actual time served, and 46 additional days of conduct credit.

The trial court sentenced Wilder to serve an aggregate term of 12 years in state prison; consisting of the middle term sentence of 6 years for his assault with a firearm by discharging a firearm, an additional 3 years for the attendant personal use of a firearm enhancement, 3 years for the attendant great bodily injury enhancement, and a concurrent 6 years for his assault with a firearm by pistol-whipping, and an additional 3 years for the attendant personal use of a firearm enhancement. The trial court also ordered appellant Wilder to pay various fines and fees, including restitution to the victim.

DISCUSSION

I

Exclusion of Opinion Testimony

Defendant Wilder contends the trial court prejudicially erred in granting the People's motion to exclude testimony of Deputy Taylor that after "interviewing the victim and S. at the hospital" it was his opinion Wilder "had discharged his weapon accidentally." Wilder contends this testimony would have corroborated his and Cornelius's version of events, and their credibility in a case that turned entirely on the credibility of the witnesses.

A.

Background

As part of their pretrial motions, the People moved to exclude "Deputy Taylor's opinion evidence that this was an accidental discharge under Evidence Code section 352. Deputy Taylor was not at the scene when this happened. He did not become involved until he was dispatched to the hospital to take witness statements. Deputy Taylor is not an expert in the area, and therefore this opinion has no relevance and would merely confuse the jury and has absolutely no probative value."

At argument on the motion, defense counsel stated: "I don't want the Court to preclude counsel from asking about the circumstances surrounding that. His ultimate opinion, I would agree is irrelevant. However I want to be permitted to probe around things that may have led him to believe that without asking his ultimate opinion."

"THE COURT: His state of mind is irrelevant. Why would I let you do that?

"[DEFENSE COUNSEL]: I understand. I wouldn't be asking about his state of mind. I am asking to be able to inquire as to his observations about--and whether he asked any follow-ups, anything to clarify that statement and the context of that statement.

"THE COURT: [Prosecutor]?

"[PROSECUTOR]: I would agree that he can ask questions about his observations and his investigation. However, should he creep too close to asking about SSD Taylor's opinion, I will be objecting.

"THE COURT: I think there is a sense here that you may be trying to get the opinion or something close to it in through the back door, [defense counsel]. You can cross-examine Officer Taylor about any otherwise admissible evidence.

"[DEFENSE COUNSEL]: I understand.

"THE COURT: What somebody told him, if it is admissible, an exception to the hearsay rule or any observation of physical surroundings and so forth and what he saw yes, that's all well and good."

B.

Forfeiture

"An erroneous exclusion of evidence will constitute grounds for setting aside a finding or a verdict only when it has resulted in a miscarriage of justice and it appears on the record that the 'substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means.' (Evid. Code, § 354, subd. (a).)" (*People v. Lucas* (2014) 60 Cal.4th 153, 232, disapproved of on other grounds in *People v. Romero* (2015) 62 Cal.4th 1; *People v.*

Morrison (2004) 34 Cal.4th 698, 711.) Here, the record does not show Wilder made any argument, in either oral or written form, for the admission of Taylor's opinion. Nor did Wilder make an offer of proof. (See *Morrison*, at p. 711.) In fact, Wilder's counsel stated he wanted to explore the circumstances surrounding the formation of Taylor's opinion, and he agreed Taylor's ultimate opinion itself, on whether the discharge was accidental, was irrelevant. In addition, Wilder's counsel made no argument in the trial court that this opinion testimony was necessary to bolster the credibility of the defendants or explained on any theory how Taylor's opinion was relevant. This claim cannot be raised for the first time on appeal. (*People v. Case* (2018) 5 Cal.5th 1, 44.)

In addition, Wilder's counsel did not offer Taylor as an expert, entitled to give an opinion, on any subject. The trial court's ruling did not preclude Wilder's trial counsel for doing precisely what he sought to do, cross-examine Taylor on his observations and investigation, any otherwise admissible evidence, such as admissible statements, observation of physical surroundings, what he saw, "and so forth." Under these circumstances, Wilder's claim is forfeited.

C.

Ineffective Assistance of Counsel

Wilder alternatively argues his trial counsel was ineffective in failing to preserve the issue for appeal and agreeing Taylor's opinion was irrelevant, claiming, "any criminal defense should know that a police officer should be qualified to offer both lay testimony as to observed facts (here the witness statements), as well as expert testimony as to the likely intent behind the discharge of a firearm given a certain set of facts (here the consistent facts as relayed by the two witnesses)."

"An appellant claiming ineffective assistance of counsel has the burden to show: (1) counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms; and (2) the deficient performance resulted in prejudice." (*People v. Montoya* (2007) 149 Cal.App.4th 1139, 1146-1147

(*Montoya*); *Strickland v. Washington* (1984) 466 U.S. 668, 687 [80 L.Ed.2d 674, 693].) "In determining whether counsel's performance was deficient, we exercise deferential scrutiny. [Citations.] The appellant must affirmatively show counsel's deficiency involved a crucial issue and cannot be explained on the basis of any knowledgeable choice of tactics." (*Montoya,* at p. 1147.) " ' " 'Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a "strong presumption that counsel's conduct falls within the wide range of professional assistance." ' " ' " (*Ibid*.) " 'Competent counsel is not required to make all conceivable motions or to leave an exhaustive paper trail for the sake of the record. Rather, competent counsel should realistically examine the case, the evidence, and the issues, and pursue those avenues of defense that, to their best and reasonable professional judgment, seem appropriate under the circumstances.' " (*Id*. at pp. 1147-1148.)

"When examining an ineffective assistance claim, a reviewing court defers to counsel's reasonable tactical decisions, and there is a presumption counsel acted within the wide range of reasonable professional assistance. It is particularly difficult to prevail on an *appellate* claim of ineffective assistance." (*People v. Mai* (2013) 57 Cal.4th 986, 1009.) " ' "[I]f the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," the claim on appeal must be rejected.' [Citations.] A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding. [Citations.]" (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

In this case, the appellate record does not reveal the tactical reason for Wilder's counsel's decision not to seek introduction of Taylor's opinion testimony. However, satisfactory explanations readily appear.

"Opinion testimony is generally inadmissible at trial. (*People v. Torres* (1995) 33 Cal.App.4th 37, 45; *People v. Williams* (1992) 3 Cal.App.4th 1326, 1332; 1 Witkin, Cal. Evidence (4th ed. 2000) Opinion Evidence, § 1, p. 528.) Two exceptions to this rule exist. First, a properly qualified expert, with 'special knowledge, skill, experience, training [or] education' may provide an opinion. (Evid. Code, § 801, subd. (b).) The subject matter of such an opinion is limited to 'a subject that is sufficiently beyond common experience that [it] would assist the trier of fact.' (*Id.*, subd. (a).) 'Expert opinion is not admissible if it consists of inferences and conclusions which can be drawn as easily and intelligently by the trier of fact as by the witness. [Citation.]' (*Torres,* at p. 45.) '[T]he decisive consideration in determining the admissibility of expert opinion evidence is whether the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness or whether, on the other hand, the matter is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.' (*People v. Cole* (1956) 47 Cal.2d 99, 103.) Thus, the purpose of expert testimony, to provide an opinion beyond common experience, dictates that the witness possess uncommon, specialized knowledge." (*People v. Chapple* (2006) 138 Cal.App.4th 540, 546-547 (*Chapple*).)

Here, there is no suggestion the opinion of Taylor on whether Wilder discharged the firearm accidentally was a matter sufficiently beyond the ordinary knowledge of the jury to be the proper subject of expert testimony. Taylor's opinion was based solely on his assessment of the preliminary interviews with the victim and S. He had not been to the scene, examined the weapon, or interviewed defendants. There is no indication in the record there was anything about his opinion that was uniquely related to his experience, training, knowledge, or expertise in any field. There is nothing in this record that suggests his opinion was anything more than "inferences and conclusions which can be drawn as easily and intelligently by the trier of fact as by the witness." (*Chapple, supra*, 138 Cal.App.4th at p. 546.)

Moreover, even if his opinion was on a subject beyond the ordinary knowledge of the jury, the information Taylor relied upon in forming his opinion cannot be said to have been the type reasonably relied upon by an expert. Taylor's opinion was based on the most preliminary stages of the investigation. The victim had been shot, was receiving medical treatment, including morphine, and had been drinking during the evening. S. was on a "come down" from using methamphetamine and had smoked marijuana that night. He also initially lied to the police to avoid being involved. In addition, Taylor's interviews were for a limited purpose, and the specific details of the shooting were left for a detective to follow up. These statements made by a victim receiving treatment and a percipient witness admittedly under the influence of various intoxicants are not the type of information reasonably relied upon by an expert in forming an expert opinion as to whether an assailant intentionally discharged a firearm. As such, we cannot conclude counsel's performance was objectively unreasonable in not seeking to have Taylor's opinion admitted as expert testimony.

Defendants also argue the evidence was admissible as the opinion of a lay witness, as opposed to an expert. "Lay opinion is also admissible, but it plays a very different role than expert opinion and is subject to different rules of admissibility. ' "Lay opinion testimony is admissible where no particular scientific knowledge is required, or as 'a matter of practical necessity when the matters . . . observed are too complex or too subtle to enable [the witness] accurately to convey them to court or jury in any other manner.' [Citations.]" [Citation.]' (*People v. Williams, supra,* 3 Cal.App.4th at p. 1332.) It must be rationally based on the witness's perception and helpful to a clear understanding of the witness's testimony. (Evid. Code, § 800; *People v. Farnam* (2002) 28 Cal.4th 107, 153; *People v. Maglaya* (2003) 112 Cal.App.4th 1604, 1609.) For example, testimony that another person was intoxicated (*People v. Garcia* (1972) 27 Cal.App.3d 639, 643) or angry (*People v. Deacon* (1953) 117 Cal.App.2d 206, 210) or driving a motor vehicle at an excessive speed (*Jordan v. Great Western Motorways* (1931) 213 Cal. 606, 612)

conveys information to the jury more conveniently and more accurately than would a detailed recital of the underlying facts. But unlike an expert opinion, the subject matter of lay opinion is 'one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness,' and requires no specialized background. (*People v. Cole, supra,* 47 Cal.2d at p. 103.)" (*Chapple, supra,* 138 Cal.App.4th at pp. 546-547.) "Generally, a lay witness may not give an opinion about another's state of mind. However, a witness may testify about objective behavior and describe behavior as being consistent with a state of mind." (*People v. Chatman* (2006) 38 Cal.4th 344, 397.) This is so even if the testimony thereby touches on the ultimate issue in a case, "but only where 'helpful to a clear understanding of his testimony' [citation], i.e., where the concrete observations on which the opinion is based cannot otherwise be conveyed. [Citations.]" (*People v. Melton* (1988) 44 Cal.3d 713, 744.)

Here, the proposed opinion of Taylor went to Wilder's state of mind. Taylor did not witness the shooting or the events leading up to the shooting. He was not in a position to offer testimony about Wilder's state of mind, or about his behavior as being consistent with that state of mind. Taylor's perceptions went to his assessment of the victim and S. and their statements. That is the testimony counsel explicitly sought to introduce and the trial court did not exclude that evidence. It was not unreasonable for trial counsel to seek to enter into evidence the admissible testimony and avoid what was not admissible lay opinion testimony.

Because there are satisfactory reasons for trial counsel's tactical choice not to elicit Taylor's opinion testimony, but rather to put before the jury the information upon which Taylor relied in forming that opinion, we reject the claim counsel's performance was deficient.

II

Section 654

Cornelius contends the trial court erred in failing to stay his sentence under section 654 for being a felon in possession of a firearm. He contends his assault with a firearm and possession of a firearm were part of an indivisible course of conduct.

Section 654, subdivision (a), provides in pertinent part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

Whether a violation of section 29800, prohibiting a convicted felon from possessing a firearm, constitutes a divisible transaction from another offense in which defendant possessed or used a firearm depends upon the facts and circumstances of the case. "[S]ection 654 will not bar punishment for both firearm possession by a felon ([former § 12021, subd. (a)(1), now § 29800; Stats. 2010, ch. 711, § 6]) and for the primary crime of which the defendant is convicted" where the convicted felon "commits a crime using a firearm, and arrives at the crime scene already in possession of the firearm, [so that] it may reasonably be inferred that the firearm possession is a separate and antecedent offense, carried out with an independent, distinct intent from the primary crime." (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1141 [§ 654 did not bar punishment for both felon in possession of a firearm and shooting at an inhabited dwelling where the defendant must have possessed the firearm before he drove toward the victim's house at which he fired several shots]; *People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1412-1414 [§ 654 did not bar punishment for both felon in possession of a firearm and two robberies, where the defendant's possession continued before, during, and after the robberies].) However, where the facts show that " 'fortuitous circumstances put the firearm in the defendant's hand only at the instant of committing another offense,' " section 654 will bar multiple punishments. (*People v.*

Garcia (2008) 167 Cal.App.4th 1550, 1565 [multiple punishment is barred by § 654]; (*People v. Bradford* (1976) 17 Cal.3d 8, 13, 22 [multiple punishment barred where the defendant shot at an officer several times with the gun defendant seized from the officer moments before the shooting]; *People v. Venegas* (1970) 10 Cal.App.3d 814, 819, 821 [multiple punishment barred where the defendant obtained the victim's gun during a barroom struggle shortly before he used it to shoot the victim].)

Here, Cornelius's own testimony establishes he did not fortuitously gain possession of the gun only at the instant of committing the assault. Rather, he returned to the apartment with the gun in his possession. He intended to keep possession of the gun until his friend moved into his own apartment and took it back. He had the gun in the waistband of his pants until it fell out of his waistband during the fight with the victim. Accordingly, the trial court correctly determined section 654 did not bar punishment for both being a felon in possession and assault with a firearm, as the possession offense was a separate antecedent event to the assault.

III

Booking Fee

Cornelius contends the trial erred in imposing a $340.01 booking fee because there was no evidence it reflected the actual cost of booking. Cornelius is mistaken. While the abstract of judgment indicates a booking fee of $340.01 was imposed, the oral pronouncement of judgment indicates the trial court followed the probation report recommendation to impose a $367.81 main jail booking fee under Government Code section 29550.2.

Where there is a discrepancy between the oral pronouncement of judgment and the abstract of judgment, the oral pronouncement controls. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-186; *People v. Mesa* (1975) 14 Cal.3d 466, 471.) The pronouncement of judgment is a judicial function, while the entry into the minutes and the abstract of judgment is a clerical function; therefore, any inconsistency is presumed to

be a clerical error. (*Mesa*, at p. 471.) Under our inherent authority to correct such clerical errors (*People v. Rowland* (1988) 206 Cal.App.3d 119; *People v. Anthony* (1986) 185 Cal.App.3d 1114, 1125-1126), we shall order the correction of the abstract of judgment to conform to the trial court's oral pronouncement of judgment.

IV

Senate Bill 620

After briefing in this case was completed, the Legislature passed and the Governor signed into law Senate Bill 620, which gave trial courts discretion to strike certain firearm enhancements in the interest of justice. Defendants filed supplemental briefs asserting Senate Bill 620 can be applied retroactively to cases not yet final and, therefore, we must remand for the trial court to determine in its discretion whether to strike the firearm enhancements imposed against them. The Attorney General agrees with them on this point. We agree with the parties.

Effective January 1, 2018, Senate Bill 620 authorizes a court to exercise its discretion under section 1385 to strike or dismiss a firearm enhancement allegation or finding made pursuant to sections 12022.5 and 12022.53. (§§ 12022.5, subd. (c), 12022.53, subd. (h); Stats. 2017, ch. 682, §§ 1 & 2.) The legislation is retroactive and applies to cases that were not final as of January 1, 2018, in which firearm enhancements were imposed. (Stats. 2017, ch. 682; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091.) Defendants' cases were not final when Senate Bill 620 became effective.

"Generally, when the record shows that the trial court proceeded with sentencing on the erroneous assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing." (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.) Here, at sentencing, the trial court lacked discretion as to the firearm enhancement. Under the newly amended section 12022.5, it now has discretion. Nothing in the record before us clearly

indicates the trial court would not have exercised its discretion to exercise its discretion and strike defendants' firearm enhancements. Accordingly, we will remand to permit the trial court to consider exercising its newfound discretion.

DISPOSITION

The matter is remanded to the trial court to consider exercising its discretion to strike any of defendants' firearm enhancements. In all other respects, the judgment is affirmed. The trial court is also directed to prepare a corrected abstract of judgment reflecting the correction stated above to the main jail booking fee and to forward a certified copy to the Department of Corrections and Rehabilitation.

/s/
HOCH, J.

We concur:

/s/
DUARTE, Acting P. J.

/s/
RENNER, J.